APPENDIX

Proceedings in the United States Court of Appeals For the Sixth Circuit

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Cause Argued and Submitted

October 20, 1956—Before: Martin McAllister and Stewart, Circuit Judges.

This cause is argued by Kalman A. Goldring for appellant and by James E. Rambo for appellee and is submitted to the court.

Judgment

(Filed October 30, 1956.)

This appeal from a judgment of conviction and sentence on two counts of an indictment charging wilful and knowing attempt to evade and defeat income taxes in large amounts has been heard and considered upon the oral arguments and briefs of the attorneys for appellant and for the United States, respectively, and upon the record in the cause;

And it appearing that there was ample substantial evidence to support the verdict of the jury that the defendant was guilty on the second and third counts of the indictment; and it appearing that the district judge correctly charged the applicable law; that he committed no reversible error in the admission or exclusion of evidence, or in the conduct of the trial;

The judgment of the district court is affirmed.

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 12,849

EARL ARTIS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM JUDGMENT OF CONVICTION.

PETITION FOR REHEARING AND REQUEST FOR AN OPINION

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IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 12,849

EARL ARTIS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING AND REQUEST FOR AN OPINION

The appellant above named respectfully petitions this Honorable Court for a rehearing of the appeal before the Court *en banc* and for an opinion in the above entitled cause because (1) the importance of this case in the general administration of the criminal law has been overlooked, and (2) the unconstitutionality of the conviction has been overlooked. In support of his position, the appellant represents to the Court as follows:

Factually this case represents a conviction on two counts charging the commission of the crime of income tax fraud by the filing of allegedly false returns on evidence devoted exclusively to net worth increases where in the Government has not only failed to prove an appropriate investigation into a *known* non-taxable source of funds but has admitted

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its failure with the excuse that it had attempted to be fair (Appellee's Brief, page 12, lower paragraph) both in its brief and on oral argument. The Government also has taken the position that it must prove an appropriate investigation into sources of non-taxable receipts only when the accused himself points out such sources. (Appellee's Brief, page 13, and oral argument).

This Court entered an order affirming the conviction without opinion on October 30, 1956.

I.

The Importance of This Case in the General Administration of the Criminal Law has been Overlooked.

A. The Court, without opinion, is passing on a novel question. The Government, on oral argument, admitted that it had disregarded and failed to investigate possible non-taxable sources of receipts or sources of income not chargeable to the taxpayer, in three regards:

(1) drawings from his partnership,
(2) his wife's receipts from the sale of birds, and
(3) cash disclosed in revenue agents' reports.

This disregard for *known* sources and the failure to investigate them is "justified" by the Government solely on the basis that the "leads" to these sources and the Government's knowledge of same were acquired independently of information furnished by or elicited from the accused.

By failing either to discuss this position or to rule on the legality of same, the Court is tacitly, but necessarily, construing the opinion in *Holland v. United States*, 95 S. Ct. 127, 348 U. S. 121, to mean that if the *defendant himself* does not furnish the explanations, the Government may

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disregard them entirely. This is a novel approach not discussed in any previously decided case.

It is submitted that the Supreme Court's discussion of "leads" in the *Holland* case was restricted to those "leads" furnished by the taxpayer solely because the facts of that particular case show a complete investigation of all information available to the Government from other sources and an asserted lack of investigation only of the taxpayer's claims.

It is further submitted as being obvious from language throughout the *Holland* opinion that the Supreme Court could never have intended to leave to the Government in its use of the net worth method the loophole and the encroachment upon the gravamen of the *Holland* opinion which the Government has availed itself of here:

> "• • • Unlike civil actions for the recovery of deficiencies, where the determinations of the Commissioner have *prima facie* validity, the prosecution must always prove the criminal charge beyond a reasonable doubt." 75 S. Ct. at 130, 348 U. S. at 126.
>
> "• • • There is great danger that the jury may assume that once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows." 75 S. Ct. at 131, 348 U. S. at 127.
>
> "• • • But when the Government uses the net worth method, and the books and records of the taxpayer appear correct on their face, an inference of willfulness from net worth increases alone might be unjustified, especially where the circumstances surrounding the deficiency are as consistent with innocent mistake as with willful violation." 75 S. Ct. at 132, 348 U. S. at 128.
>
> "While we cannot say that these pitfalls inherent in the net worth method foreclose its use, they do require

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the exercise of great care [illegible] care and restraint." 75 S. Ct. at 132, 348 U. S. at 129.

This Court, by sustaining t[illegible]ning the Government's deliberate omission to investigate *know*[illegible] *known* sources of non-taxable income in the face of the burde[illegible] burden which the Government has to affirmatively preclude such[illegible] such sources, has established a precedent for disregarding th[illegible]ing the safeguards erected by the *Holland* decision against reck[illegible]t reckless uses of the net worth method. That this Court s[illegible]rt should so modify these safeguards and guarantees withou[illegible]ithout a word of opinion is inconsistent with a full measure of[illegible]re of justice.

B. Even assuming *argue*[illegible]*guendo* that the question discussed above is not novel, this Court[illegible]ourt is nonetheless sustaining, in effect, the Government's righ[illegible] right to disregard information in its possession which is explan[illegible]planatory of defendant's receipts without negating such expl[illegible] explanations. By so doing, the Court's decision is in conflict[illegible]flict with the following cases:

Yaw v. United States, 228 [illegible] 228 Fed. (2d) 382, wherein it was held that witnesses and evid[illegible]evidence, available to the Government but not produced or ac[illegible]r accounted for at trial, must be presumed to contradict the [illegible] the Government's assertions.

United States v. Adonis, [illegible]*is*, 221 Fed. (2d) 717, wherein it was held that by negating t[illegible]g the explanations received from third persons, the Governme[illegible]ment was negating the explanation of the defendant.

Marcella v. Commis[illegible]*missioner*, 222 Fed. (2d) 878 at 885:

> "Since neither the Co[illegible] Commissioner nor the Tax Court gave consideration to [illegible] to sources of non-taxable cash available to the taxpaye[illegible]ver from his substantial business interests, the deficiency[illegible]ncy determination made by the Tax Court is clearly er[illegible] erroneous in that it was induced by an erroneous view of[illegible] of the law and is not supported by substantial evidence[illegible]ce."

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Dupree v. United States, 218 Fed. (2d) 781 at 784:

"The Government has still a further burden in this type of case. It is elementary that there are sources of funds that make their receipt non-taxable to the recipient. The Government, in proving its *prima facie* case must therefore exclude such sources of available funds by affirmative evidence."

Justice requires that the conflicts thus created, and detoured by the lack of an opinion here, should be discussed and explored before a defendant be required to spend his declining years in federal detention.

C. The per curiam decision of this Court nowhere discloses the *ratio decidendi* but sends the appellant to serve five years in prison without telling him wherein his defense is erroneous. In this respect the case at hand may be contrasted with *United States v. Nunan,* 236 Fed. (2d) 576, wherein the defendant, an attorney and a former Commissioner of Internal Revenue, was possessed of no books or records. Notwithstanding, the Court there used sixteen printed pages to explain the invalidity of all the various defenses raised. It is submitted that this defendant who attempted to keep records, who has never held a position of public trust, and who has no intimate working knowledge of internal revenue laws and their violations is entitled to receive at least commensurate consideration and explanation. This discrepancy in treatment, together with the fact that the sentence here is more severe than that given to the accused in the *Nunan* case, does not appear to represent anything approaching equal justice under the law.

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II.

The Unconstitutionality of the Conviction has been Overlooked.

As set forth at pages 32 and 33 in Appellant's Brief before this Court, the defense proceeded on a theory that excessive drawings from a partnership constitute a non-taxable receipt. This point was not presented to the Jury in the Court's charge, although specific exception was taken thereto (Appendix to Appellant's Brief, page 403a) and was the major point argued orally before this Court.

The failure of both the Trial Court and this Court to pass on this defense constitutes an unconstitutional denial of due process. The Constitution has been held to require each and every defense to be submitted to the Jury. *Hanson v. United States*, 208 Fed. (2d) 914, *Jenkins v. United States*, 59 Fed. (2d) 2.

Another defense theory never submitted to the Jury or passed upon by this Court was that the defendant had done everything which a reasonably prudent businessman would have done to file a correct return. This defense has been upheld either impliedly or expressly as a basis for reversing both criminal tax fraud convictions, *Lurding v. U. S.*, 179 Fed. (2d) 419, and judgments of civil penalties, *Davis v. Commissioner*, 184 Fed. (2d) 86, *Hatfried, Inc. v. Commissioner*, 162 Fed. (2d) 628.

III.

A Full Opinion is Needed.

The matter before the Court involves only the criminal responsibility of one man. However, the civil liability of his wife is also involved in a proceeding before the Tax

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Court of the United ates and a criminal proceeding against his partner i ending trial before the United States Court of the S hern District of Ohio. In view of these circumstances unsel and the Courts below may well be substantially ed by an appropriate discussion of the issues raised.

Further, the lack of opinion in this case leaves nothing remaining of the preme Court's direction in the *Holland* case:

> "* * * Appellate C rts should review the cases, bearing constantly in d the difficulties that arise when circumstantial evic ce as to guilt is the chief weapon of a method that itself only an appropriation." 75 S. Ct. at 132, 34 J. S. at 129.

Finally, the effect of is case as it now stands is to hold that so long as the Go rnment

(a) proves the co of some items

(b) puts them on chart, and

(c) calls it a ne worth computation of deficiency, it has carried its bur n of proof with showing that it has properly accounted or all known items of receipt. The rest is up to the defens

For the foregoing re sons, this petition for a rehearing of the appeal and for a opinion should be granted.

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Affidavit.

State of Pennsylvania, }
County of Allegheny. } ss.:

Kalman A. Goldring, being first duly sworn, on oath certifies and says:

That he is the attorney for the appellant in this cause; that he makes this certificate in compliance with Rule 28 of this Court; that in his judgment the within and foregoing petition for rehearing is well founded and is not interposed for delay.

KALMAN A. GOLDRING (s).

SWORN to and subscribed before me at Pittsburgh, Pennsylvania, this 15 day of November, 1956.

RUTH E. PAYNE (s),
(SEAL) Notary Public,
Commonwealth of Pennsylvania,
My Commission expires: Feb. 2, 1957.

Order Denying Rehearing

(Filed November 26, 1956.)

The petition for rehearing is denied.